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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 78

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BARKER DUNCAN,

*Petitioner,*

*vs.*

GUY A THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY.

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## PETITIONER'S REPLY BRIEF.

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*Respondent.*

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## PETITIONER'S REPLY BRIEF.

---

### I.

Respondent in the brief herein filed has abandoned entirely the theory upon which the Springfield Court of Appeals decided this case (R. 88, 124). It is not difficult to understand this action for the opinions of the Springfield Court of Appeals in this case are inconsistent, illogical, unreasonable and unjust. Respondent has apparently recognized that the position there set forth is untenable. Indeed the opinion meets itself coming back. In the first part of the opinion, in an effort to hold the requirements of the Federal Employers' Liability Act fully satisfied, it

determines that there has been an accord and satisfaction of the debt which took place after the injury (R. 102-103) and then in the latter part of the opinion, in an effort to avoid the effect of Section 782 R. S. of Missouri, 1929, the Springfield Court contends that the agreement, Exhibit D, is not an accord and satisfaction, "it does not finally bar the cause of action" (R. 104).

## II.

Petitioner, however, firmly stands upon the proposition set forth in the Petition for Writ of Certiorari and the supporting brief herein and urges that the position there taken applies with equal force whether we *call* the "unique device" an accord and satisfaction, a covenant not to sue, a release, or what not. It is still a "unique device" and cannot be properly classified with any of the recognized and oft used instruments. It stands alone as a clever device, conceived and borne "so they (the railroad) could help them (the former employee) out just as well under the Federal (Federal Employers' Liability Act) (as under the Missouri Workmen's Compensation Act) to tide them (the former employee) over until they (the former employee) had their recovery before we (the railroad) negotiate final settlement" (R. 35—testimony of claim adjuster as to purpose of Exhibit D). That is what the railroad attorney said was the nature of this instrument! That does not fall within the theory of the Springfield Court of Appeals decision of accord and satisfaction. That does not fall within the theory of the Railroad of covenant not to sue. That does not fall within the theory of any of the cases cited by the Railroad (Respondents' Brief 18) of release and discharge. Exhibit "D" is plainly and simply a fraud, a snare, a device to catch the believing and unsuspecting, the weak and poverty stricken. Its true purpose is to advance a few dollars "living expenses" (more than can be

expected to be repaid) and thus, by paying what the railroad acknowledges to be but a "partial payment" of the damages which have been sustained, to thereby exempt the railroad from answering to the injured employee for the *full* payment of the damages which have been sustained. Certainly Sec. 55 cannot be so limited in its effectiveness. It must be construed to insure payment to an injured employee of such a sum as may be *agreed upon* as the fair consideration for settlement and discharge, or that which a jury may assess as fair. A partial denial of petitioner's rights herein is as offensive to the spirit and object of this Sec. 55 as a total denial. The railroad, when making this payment recognized it as a "partial payment"; recognized that full compensation had not been paid for the injuries petitioner received, and represented that further negotiations would be had to determine the additional amount due petitioner. Note the very clever drafting of the form (R. 18) where it provides "and also the additional sum of $—". A rare bit of clever psychology, to intimate that there was to be an additional sum paid! And which, of course, there was never any intention to pay. "Living expenses and other expenses" would soon eat up the $600, and how would a helpless cripple, still on crutches 16 months after the injury (R. 35), with a sick and ailing wife, then on her death bed (R. 37), ever be able to repay the $600 with interest? Petitioner couldn't do it, especially in the eight months remaining before the statute of limitation would run, and the railroad knew petitioner would not be able to do so, thereby denying to petitioner the compensation the Federal Employers' Liability Act guaranteed him. A "unique device" it is, by means of which many, many unsuspecting, uneducated, unadvised, ailing, needy, poverty stricken former employees of railroads all over the United States will be persuaded, beguiled and misled into accepting "advances for living and other expenses" "pending * * * nego-

tiations for settlement of my claim" and "partial payment(s) in settlement for injuries." It is nothing more nor less than a device, to exempt the Railroad from the liability imposed by the Federal Employers' Liability Act and is condemned by 45 U. S. C. A. 55.

Considering further the position assumed by the Railroad in its brief herein, we respectfully urge that the new theory advanced by the Railroad possesses exactly the same fatal defect which is apparent in the theory of the opinion and decision of the Springfield Court of Appeals. There was, of course, at no time an accord and satisfaction (as Judge Tadlow contended) of the Petitioner's cause of action. There was not at any time any understanding on his part that there was a full payment of the debt or obligation owed him by the Railroad, nor was there any meeting of minds between the Trustee and the Petitioner as to the consideration which would be paid for such accord and satisfaction.

## III.

Likewise, under the Railroad's present theory, a "*covenant* not to sue" is but an *agreement* between the parties, calling for an *understanding* of the nature of the instrument, a consideration, and a meeting of the minds as to the consideration to be paid. There being no such *understanding*, no such *consideration*, and *no such meeting of the minds*, there could be no agreement, no covenant not to sue or release of Petitioner's cause of action for the reason that, as any other contract and agreement, there must be a consideration and there must be a meeting of the minds of the participating parties as to the fact and amount of such consideration and then, of course, there must be a payment of such consideration. None of these things exist in the instant case. The draft, which was issued to Petitioner, on its face recited that it was "on account of partial payments," (R. 127) and the agreement which Petitioner

herein signed recited that the "sums are paid to me at my request *for living and other expenses pending* further developments as to the extent and effect of said injuries and *negotiations for settlement* of my claim against said Trustee for said injuries" (R. 18). How could there possibly be a meeting of the minds as to the consideration for the settlement of the obligation, when all of these factors so definitely indicate with a certainty that there was no meeting of the minds as to the consideration to be paid for the satisfaction of the debt or for the release or discharge of the Respondent from liability. The recited consideration of $600 was not *in full* settlement. Exhibit D at no point states that the $600 is *full* payment, *full* compromise, or *full* release or discharge (every implication is to the contrary). Some part of the consideration for *full* release, for *full* discharge remained to be paid. That amount, whatever it is, has never been agreed to by Petitioner. Therefore, under any theory, no contract, be it of accord and satisfaction, or be it of release and discharge, has ever been consummated between the parties. This statement also applies to what the railroad calls "covenant not to sue" as applied to this case, for *under the facts in this case the claimed covenant not to sue* (we deny Exhibit D is a covenant not to sue) *is a release and discharge.* It is the established rule in Missouri, as elsewhere, that a "covenant not to sue" when taken in a case where there is but one defendant, where there is but one party who is responsible for the injury incurred, *is in law a release and discharge. McDonald* v. *Goddard Grocery Co.*, 171 S. W. 650, 184 Mo. App. 432, 434-5. In this instant case, there is only one defendant, only one party liable for Petitioner's injuries, therefore any "covenant not to sue" is a release and discharge. To be effective, it must be understood by the parties both as to the nature of the instrument and as to the fact that a sum is being paid *in full settlement*, rather than as a *partial*

*settlement.* Without question, neither of these conditions exist in the instant case.

> "• • • there can be no affirmance or ratification of a release without full knowledge of its terms. Nor can there be a release of a cause of action without unequivocal acts of the plaintiff showing expressly or by necessary implication that he intended to release." 23 R. C. L. 390.

May we respectfully inquire how intent to release can be reasonable or necessarily implied from financial inability to repay the loan? No such implication can exist. We respectfully contend that Exhibit D, if a covenant not to sue, is in fact and law a discharge and release and its validity must be judged by the law governing releases and discharges. The meat of a covenant not to sue is the acceptance of a sum less than "full payment" and the *retaining of the cause of action against other liable parties.* This is the only theory upon which a plaintiff can proceed to prosecute a cause of action against other defendants after executing a covenant not to sue to one defendant. Such a plaintiff has not received full compensation for his injuries, and he, in every case, executes the covenant knowing that he has the *unconditional* right to claim, sue for and receive further payment for his injuries. Judged by this standard, it clearly appears Exhibit D cannot be considered a "covenant not to sue."

Respondent in the brief herein filed very cleverly endeavors to show that that element of Exhibit D which is the very essence of Petitioner's complaint is, in fact, a condition existing for the benefit of Petitioner. The approach is clever but we trust will be ineffective. It is very much like the explanation given by the old lady, nursing a diabetic patient, who giving her patient sugar in his coffee contrary to the doctor's orders, excused her act by saying that the sugar was much more expensive and finer and tasted so

much better than the saccharine which the doctor had ordered used. The very evil is this so-called advantage, which was inserted in Exhibit D, for the only purpose of preventing Petitioner from enjoying the rights granted under the Federal Employers' Liability Act. It is certain that the railroad, when the repayment provision was inserted in the agreement, did not expect it to operate to the benefit or advantage of Petitioner. It was inserted to deprive Petitioner of his cause of action and the Springfield Court of Appeals has determined that it was effective to accomplish this.

IV.

In respondents' brief, it is urged that this Court is not concerned with the question of State law "decided by the opinion" to-wit, the holding that under the Missouri law a return of the $600 had to be made unless there was "fraud in the factum" and that in the instant case there was no "fraud in the factum" proved. This, of course, is not a proper statement of the applicable law for this Court is at all times concerned with any proposition or point of law which, if erroneously decided, deprives a party of rights granted or guaranteed under the Federal statutes or the Federal Constitution. This Court will go into the record of the case, determine whether in truth a Federal right has been denied, and brush aside any decision not based on substance which defeats a claimed Federal right.

*Northern Ry. Co.* v. *State of Washington*, 300 U. S. 154, 57 S. Ct., 397, 81 L. Ed. 573;

*Norris* v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579, 59 L. Ed. 1074;

*Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238;

*Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

In the instant case, fraud was perpetrated in the *factum*. Petitioner herein testified that representations were made to him by the Railroad's lawyer that his case was governed by the Missouri Workmen's Compensation Act (R. 15) that the money was an advance on his claim (R. 16) that the Exhibit D was not a release (R. 16) and that they were going to take care of petitioner and a law suit would be unnecessary (R. 16).

The jury, by the instructions, were required to find that the Railroad had fraudulently obtained his signature to Exhibit D by representing that the Workmen's Compensation law applied and that the $600 was but a partial payment on his claim (R. 39). Certainly this was fraud in the *factum*, or there was no understanding of the terms of the instrument which he was signing. A very similar case arose in the Kansas City Court of Appeals, *Green* v. *Chicago B. & Q. R. Co.*, 251 S. W. 931, 213 Mo. App. 583. In that case, the plaintiff testified that she thought the $100 paid her was part payment of the hospital expenses and that the claim agent so stated. The court held no tender of the return of the $100 was required. As to the evidence of fraud, the court stated; S. W. 933:

> "Now as to whether there was evidence of fraud, we must refer to plaintiff's testimony. She testified that defendant's claim agent told her the paper she was signing was a receipt. The instrument was a purported release. The jury found that the instrument was not a valid release, and we are not authorized to disturb that finding."

In the case of *Houghtaling* v. *Banfield*, 8 S. W. (2) 1023, the St. Louis Court of Appeals rendered a similar decision where the plaintiff's evidence was to the effect the claim agent told him the instrument was a receipt for wages, while it turned out later to be a purported release of liability for damages. No tender of the consideration was there required.

However, the Springfield Court of Appeals, in spite of the jury's findings under the instructions, disposes of Petitioner's rights with a dip and whiff of the pen, castigating petitioner's attorneys in the trial court by the unfounded and unjustified accusation that "the plea of fraud is no doubt an after-thought on the part of counsel for plaintiff" (R. 106). Also see on same page "had plaintiff's counsel made a competent investigation of the question." Quite apparently the writer of the opinion settled some personal scores in this opinion, as well as exhibiting his qualification as a legal contortionist.

However, when we review the plaintiff's testimony, note that the claims attorney did not deny petitioner's statement that the claims attorney told petitioner the document was *not a release*, did not deny that he told Petitioner that the money was just an advance and they just had a formal requirement of executing the paper form in such cases, all this, coupled with the "partial payment" statement on the draft and the "advance for living and other expenses" in the purported agreement, certainly the jury was fully justified in the conclusion that fraud was perpetrated. Thus, there was a clear misrepresentation as to the nature of the instrument which this petitioner had been induced to sign and thereby fraud in the *factum* was alleged, proved and found by the jury to have been perpetrated. Thus, under the cases cited by the respondents, under established Missouri law, no tender was required and this Court will consider, determine and pass upon such question as the erroneous determination thereof deprives a part of a claimed Federal right.

## V.

Without in any way conceding the inapplicability of the above contentions, we respectfully contend that the Springfield Court of Appeals decision was erroneous and inconsistent with established State practice in that there was no

remanding of the case granting to petitioner an opportunity to make a tender of the $600, if such tender was required as a precedent to the prosecution of the suit. In this case, the Springfield Court of Appeals decision recognizes that petitioner has a right of action against the respondents and under such circumstances it was a mandatory duty of the court to remand the case rather than to reverse outright. *Finnegan* v. *Mo. Pac. R. Co.*, 149 S. W. 612, 244 Mo. 608. It must appear without a doubt that plaintiff cannot produce facts justifying recovery to warrant a reversal of the cause *without* remanding for a new trial. *Hamilton* v. *Frisco*, 279 S. W. 177, 181 (Mo. App.)

Under all the law in Missouri, petitioner should have been permitted to, on remanding the case, amend his petition tendering a return of the $600, if such is necessary to permit a prosecution of this action. The Supreme Court of Missouri in the case of *Jensen* v. *Wilson Township, Gentry County*, 145 S. W. (2) 372 (Not yet officially reported) has recognized the right, on remanding the case, for amendment to petition changing the basis of the cause of action. The court stated in this connection:

> "This Court has frequently held, when there is evidence tending to show plaintiff has rights growing out of the transaction involved, but has misconceived the remedy, an appellate court has discretion in the matter, and may remand the cause to permit the petition to be amended, and a retrial of the cause."

This judgment was reversed with directions "to allow plaintiff to amend his petition if he so desires and to try the cause anew in conformity with the views herein expressed * * *."

It is difficult to understand why Springfield Court of Appeals felt justified in reversing this cause without remanding the case when it is clearly apparent that the petitioner herein is barred by the two year limitation contained

in the Federal Employers' Liability Act from bringing another suit. In the case of *Bell* v. *Wabash Ry. Co.*, 58 Fed. 569, the United States Circuit Court of Appeals for the 8th Circuit, having jurisdiction over suits arising in Missouri determined:

> "No statute providing that if plaintiff commences suit within the time fixed by law and afterwards suffers a new suit, he may commence a new suit within one year from the date he suffers such new suit, but surely it would not be contended that a state statute could extend the period of limitation fixed by the Federal Employer's Liability Act."

The Railroad claims attorney testified that they were trying to work out a plan like Workmen's Compensation for the injured employees, like petitioner, who were badly hurt and injured over a long period (R. 35). No Workmen's Compensation payment has to be returned in order to prosecute a claim. Likewise, a company does not "want" to make payments available when there is no liability. The railroad well knew they were making a payment they would not be able to defeat, at least in such a small amount. All an employer paying Workmen's Compensation prior to final settlement gets is credit on the sum finally due. The Railroad says (R. 35) that they devised Exhibit D to help employees injured under the Federal Act. If they just wanted to "help" the employees, why are they so difficult now. It would seem that they might be taken at their word, crediting the $600 on the judgment, as the jury did, and let them pay the balance.

Certainly the respondent in this case cannot fairly expect anything more than this and if a tender or even an actual payment of the $600 is made, the Railroad company has been made whole and suit should be permitted to be maintained without a dismissal. In this connection petitioner vehemently denies the suggestion contained on page 26 of

respondents' brief that petitioner "belied the truth" of petitioner's contentions that he was without funds with which to make repayment of the $600 advanced him by the railroad company. Certainly we should not assume that because petitioner can now raise the $600, that he could have done so before the statute of limitation expired three and one-half years ago. Conditions are now much better, petitioner's injuries are now more healed than then, a judgment has once been obtained indicating a probability of ultimate recovery. All of these factors fairly explain why a request for a remanding of the case (if our other points fail) is not any indication of bad faith and certainly is no proof of the financial condition of petitioner in the spring of 1938.

Before closing, we would point out that each case cited in Railroad's brief is clearly distinguishable from the instant case.

*Griffin* v. *New York, etc., R. Co.*, 279 Mass. 511, 181 N. E. 839.

This case has no application, as it holds plaintiff waived action by withdrawing count predicating liability on Federal Employers' Liability Act.

*Central of Ga. R. Co.* v. *Hoban*, 102 S. E. 46, 24 Ga. App. 686.

*Anderson* v. *Oregon Short Line R. Co.*, 47 Utah 614, 155 Pac. 446.

*Patton* v. *Atchison, etc., Ry. Co.*, 59 Okla. 155, 158 Pac. 576.

*Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367, 190 N. W. 275.

*Ballenger* v. *Southern Ry. Co.*, 90 S. E. 1019, 106 S. C. 200.

*Panhandle, etc., Ry. Co.* v. *Fitts* (Tex. Civ. Appl.), 188 S. W. 528.

In all of the above cases, the decision is based on one or both of two propositions:

(1) It has never been the policy of Congress to oppose or discourage the amicable settlement of disputes between parties. As stated in the *Anderson* case above:

> "The purpose * * * was not to prevent the employee and his employer from compromising and settling any matters of difference existing between them. In making such a settlement, if it is fair and free from fraud, concealment, etc., no rights of either of the parties are frittered away, but on the contrary, are firmly maintained."

Therefore, Section 55 should not be held to void a full, complete and final compromise and settlement agreement.

(2) That a full and final settlement of a controversy is an admittance of liability, not an "exemption" from liability as referred to in Section 55. As stated by the Supreme Court of Oklahoma in the *Patton* case, *supra:*

> "In fact, it recognizes the liability of the company, and is a liquidation of the damages sustained by the plaintiff and a settlement of the amount thereof."

Therefore, Section 55 should not be held to void such final and complete settlements.

However, we point out that in the present case, neither of these factors exist. There has never been a compromise and settlement of the differences existing between the parties here. That was to take place after Exhibit D was signed. It has never taken place, and (by the jury's verdict) 90% of petitioner's damage remains uncompensated. Further, Exhibit D recites that the Railroad denies liability for the injuries, so, there has been no "recognition of liability" in this case and thus those cases do not apply.

While in a few of these cases it is recited that Section 55 applies to contracts made prior to the injury, in no case is

such a contention determinative of the issue involved, and when that rule is considered in the light of the scheme formulated by the Railroad in this case, it is clear that it cannot be adopted by this High Court.

In closing we earnestly submit that the opinion herein reviewed and the decision resulting therefrom is in itself unique, along with the instruments which it purports to validate, that the decision is in itself a tortured expression of non-existent law, inconsistent within itself and a direct challenge to any supervising court possessing comprehension and understanding of the Federal Employers' Liability Act. The device which it purports to legalize is a direct challenge to the Federal Employers' Liability Act in its operation and effect. This is the basis on which it must be judged, a device having for its purpose the exemption of railroads from the liability imposed by the Federal Employers' Liability Act. We earnestly solicit and know this case shall receive the careful consideration of this Court and we urge without reservation the action of this Court reversing the judgment of the Springfield Court of Appeals in this case.

Respectfully submitted,

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